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No. 06-1423

In the Supreme Court of the United States

RES-CARE, INCORPORATED, SUCCESSOR BY MERGER TO RES-CARE HEALTH SERVICES, INCORPORATED, AND COMMUNITY ALTERNATIVES INDIANA, INCORPORATED,
Petitioners,

v.

OMEGA HEALTHCARE INVESTORS, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

Respondent Omega Healthcare Investors, Inc., has no parent corporation, and no publicly-held company owns ten percent (10%) or more of its stock.

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BRIEF IN OPPOSITION

I. Question Presented

Res-Care's statement of the question presented mischaracterizes both Omega's Complaint and the Seventh Circuit Court of Appeals' decision, and misreports significant holdings of the Supreme Court decision upon which its Petition for Writ of Certiorari is purportedly based. Accurately restated, the question posed by this Writ is:

> "Should the ADA be reinterpreted, seventeen years after it was enacted, retroactive to 1999, to excuse from liability a single, private lessee-operator of a private, Kentucky ICFMR, who closed and decertified the leased facility in violation of its Lease."

II. Statement of the Case Corrections and Additions

Res-Care has mischaracterized certain essential facts and issues, and omitted others, in its Statement of the Case. The following corrections and additions are relevant to this Court's consideration of whether the ADA should be reinterpreted.

A. Both the ADA and *Olmstead* were irrelevant to Res-Care's contract breach.

Res-Care seeks to wrap itself in the flag and proclaim that its actions in breaking its contractual obligations were reluctantly compelled by its desire to comply with the provisions of the ADA and the "integration mandate" discussed and defined in *Olmstead*. However, the ADA was enacted in 1990. The *Olmstead* decision was not decided

until June of 1999. It was mid-1998 when Res-Care began taking steps to close and decertify Omega's facility. (Res-Care's Petition, page 6.)

If the ADA mandated such action when it was enacted, why did it take Res-Care eight years to notice? At the time that Res-Care closed and decertified Omega's facility, Res-Care was the country's largest provider of institutionalized ICFMR services. The same year that Res-Care breached its contract by terminating Omega's facility's Medicaid certifications, under the claim that it was mandated to do so by the ADA, Res-Care purchased three additional ICFMR facilities, which it continued to run as large ICFMRs for many years. Res-Care is asking this Court for a reinterpretation of the ADA that can somehow be limited to one facility Res-Care leased, but not the other facilities that Res-Care owned.

Res-Care's claim that it was acting under the compulsion of the *Olmstead* decision is equally untrue. *Olmstead* was not decided until June of 1999, almost a year after Res-Care began taking steps to breach its contract with Omega. Res-Care's chairman, Ron Geary, was candid in his deposition about Res-Care's actual motivations. Res-Care took this action after a cost benefit analysis concluding that the virtually-unregulated (at the time) community care system would be more profitable to Res-Care than the heavily-regulated ICFMR facilities. Geary described the federal funding as a "pot of money," a larger percentage of which would be Res-Care's if the Omega facility was decertified and closed, and the Medicaid funding transferred to Res-Care's anticipated conversion waiver service contracts.

B. The contract Res-Care breached did not restrict individual resident rights.

First in the District Court, then in the Court of Appeals, and now in the Supreme Court, Res-Care has continued to repeat the same inaccurate slander. Res-Care falsely alleges that Omega is claiming that the residents of its facility are "operating assets" whose movement is at issue. Omega has never made such a claim. It is only Res-Care who has acted to deprive facility residents of their freedom of choice mandated by *Olmstead*. The "operating asset" of Omega that has always been at issue is the Medicaid certification of the facility as an ICFMR. It is the contractual protections of that certification which were breached by Res-Care.

Omega has never objected to any individual moving from its facility to different accommodations. Residents rarely, but periodically, chose to move to either community care, another private ICFMR, a state-owned or Res-Care-owned ICFMR, or the private care of friends or relatives. The Omega facility historically maintained 99% occupancy, without any restrictions on resident movement, because it was a well-run and pleasant facility. There had always been a long waiting list of eligible and unserved individuals waiting to enter the facility, to replace individuals who preferred to receive care in a different setting. Contrary to Res-Care's misrepresentation, Omega sought only to protect its certifications, and to enforce Res-Care's lease obligation to fill occupancy openings resulting from individuals leaving the facility with one of the thousands of qualified but unserved individuals on the waiting list for receipt of such services.

Early in the lawsuit, an Agreed Order was entered to temporarily prohibit Res-Care from evicting the residents of Omega's facility, until the Court could determine whether

Res-Care had the right to empty, close, and decertify Omega's facility, in violation of its lease obligations. A second Agreed Order was later entered which reaffirmed that Omega had no objection to any individual wishing to leave the facility doing so. The same Agreed Order ordered that Res-Care do nothing during its extended period of possession to cause the decertification of the facility, or to prevent Omega's next lessee-operator from replacing any individuals who chose to depart. See Res-Care's Petition Appendix, pages 74(a) and 75(a), paragraphs 4 and 6. Res-Care closed and decertified Omega's facility during the holdover period in direct contempt of the District Court's Agreed Order. Res-Care's conduct became not only a breach of its contract with Omega, but also a fraud upon the Federal District Court.

By the time Summary Judgment briefs were filed in the District Court, Res-Care's persistent misrepresentations of Omega's allegations were already an issue. No matter how many times Omega advised Res-Care and the District Court that Omega was not claiming that individual residents did not have the right to move out of the facility whenever they chose to do so, Res-Care continued to demand to litigate what it wished had been Omega's allegations, instead of the actual allegations which it could not defend. In its Brief to the District Court in opposition to Res-Care's Motion for Summary Judgment, Omega found it necessary to state the following:

> "B. Res-Care's 'Straw Man' Claim that this litigation has anything to do with preventing people with disabilities from moving into the community should be rejected, again.

> It is tiresome to have to continue to repeatedly respond to defendant's same, persistent misrepresentation of the allegations of Omega's Complaint. Once again, Res-Care files a brief in which they pretend that they still don't understand that Omega has never claimed that any provision of the leases between Res-Care and Omega prohibits individual residents from moving out of the facilities, for any reason. Omega has never claimed that Res-Care is liable for breach of contract or conversion or on any other theory because individual residents, from time to time, elect to move out of Res-Care managed facilities. After three Complaints and multiple briefs on the subject, it can no longer even be pretended by Res-Care that their persistent misrepresentation of Omega's legal and factual positions is an honest inability to understand or comprehend what this lawsuit is actually about."

(Rec. Doc. 182, page 20.)

Here, in the Supreme Court, Res-Care is still repeating the same falsehoods about Omega's allegations.

C. The residents of the facility did not ask to be relocated; they were forced by Res-Care to leave.

Res-Care characterizes its actions as a response to resident demands to be moved to community-based programs, but the record shows the opposite. There was a high level of satisfaction with the services being provided to the residents in the facility until Res-Care notified those residents that the facility would be closing, and that they would have no choice but to relocate. The District Court made Findings of Fact confirming that Res-Care told the residents that they had to

relocate, rather than receiving requests from residents to do so. See Res-Care's Petition Appendix, page 39(a), Findings of Fact 14 and 15.

D. The State of Kentucky did not support Res-Care's "public policy" claims.

By attaching Amicus Briefs filed in the District Court, Res-Care attempts to put a non-existent stamp of State support upon its actions. In fact, the Amicus Brief filed by Protection and Advocacy, a Division within the Department of Public Advocacy in Kentucky State Government ("P&A"), was brought on behalf of three individuals (out of the 180 at the facility) who had located alternative accommodations and desired to move. The move of those three residents was temporarily delayed by the first Agreed Order in which Res-Care agreed not to transfer residents out of the facility until such time as the Court could hold a hearing to determine the parties' respective contractual rights as to the continuing operation of the facility. At that hearing, no one opposed the move of those three individuals. The second Agreed Order, entered at the hearing, expressly preserved the right of any individuals to leave the facility if they chose to do so.

The Kentucky Cabinet for Health Services submitted an Amicus Brief supporting the closing of the facility, but not based on any generally-applicable public policy. They claimed that the secret negotiations between Res-Care and the State had gone so far toward a conclusion, that it would be unfair to interrupt the process at that point. In the same brief, however, the Health Cabinet argued against the existence of a public policy generally requiring the closing of ICFMR facilities, because of the state-owned and state-sanctioned facilities which continued to be operated.

The Kentucky Health Cabinet did not even claim that Res-Care should be relieved from its contractual obligations to Omega, or relieved of the obligation to pay damages, in the event that Res-Care's agreement with the State to close and decertify the facility was a breach of its contractual obligations to Omega.

> "The cabinet is not a party to this litigation and expresses no opinion concerning the outcome of the monetary claims between the parties."

Appendix, page 60(a) - 61(a).

E. There was no shortage of demand for ICFMR services.

In its brief, Res-Care refers to ICFMRs as having no significant demand, and likens them to "buggy whip" manufacturers, in an effort to suggest that Res-Care's de-certification of one such facility in breach of its contract should be forgiven. The argument is simply false. Until Res-Care closed the facility and advised the residents that they would have no choice except to move out of the facility, it was 100% occupied. There were waiting lists for space in such facilities at the time Omega was closed, and those waiting lists remain to this day. Omega acknowledges as much in its Petition when it accurately notes that the breach of contractual duties by Res-Care creates liability on the part of Res-Care for "millions of dollars in damages." Petition, page 3.

F. Additional facts omitted from Res-Care's Statement of the Case.

Res-Care prepared a proposal for the State of Kentucky under which Res-Care offered to permanently close Omega's facility in exchange for the State of Kentucky's agreement to use the money saved by the State to fund an additional 180 "waiver" slots. (R. 185, page 10; R. 186, Kelley deposition, pages 80-82.) Res-Care approached the State about closing the Omega facility. (R. 185, page 10; R. 186, Morse deposition, page 7; Geary deposition, page 73.) The State of Kentucky never threatened to close the Omega facility independent of Res-Care's offer to voluntarily do so. (R. 185, page 10; page 186, Cross deposition, page 111.) The State of Kentucky has never attempted to force any legally-operating private ICFMR to close for the purpose of seeking to "downsize" or to convert its ICFMR funding into "waiver slots," nor did the State have any future plans to do so. (R. 185, page 10; R. 186, Boyd deposition, pages 19-20.)

The State of Kentucky made it clear to Res-Care that the only way Res-Care could acquire additional conversion waiver slot funding would be if Omega's facility was decertified and closed. (R. 185, page 10; R. 186, Kelley deposition, page 149.) Res-Care knew that the closing and decertification of Omega's facility had to be permanent, in order to obtain additional State funding for Res-Care's community-based services. (R. 185, page 11; R. 186, Waskey deposition, pages 76-77; Geary deposition, pages 118-119.) Res-Care knew that Kentucky would only be willing to fund the new waiver slots if Omega's facility was permanently closed and decertified. (R. 185, page 11; R. 186, Geary deposition, pages 118-119.) Res-Care promised Kentucky officials that they would cause the permanent decertification of Omega's facility in exchange for additional

waiver slot funding. (R. 185, page 11; R. 186, Morse deposition, pages 7-8.) Res-Care told State officials that it had the ability to permanently close Omega's facility, and acknowledged that Res-Care understood that this was an important condition of their additional funding request. (R. 185, page 11; R. 186, Boyd deposition, pages 9-10.)

Res-Care's General Counsel, David Waskey, and the counsel for the Kentucky Cabinet of Health and Human Services, Ellen Hessen, met to discuss how the operation of Omega's facility could be permanently terminated. (R. 185, page 11; R. 186, Kelley deposition, pages 147-148.)

None of the residents of the facility were given a choice by Res-Care to remain. The residents had no choice about whether or not the facility would remain open, or whether they would be required to move. (R. 185, page 11; R. 186, Boyd deposition, pages 18, 25, 33-34.)

III. Reasons for Denying the Writ

A. Res-Care admits that no generally-applicable "public policy" exists.

Res-Care admits in its Petition that the closure of Omega's facility in violation of Omega's contract could not be justified on the grounds of any generally-applicable public policy, as expressed in the ADA as interpreted in 1999 by *Olmstead*:

> "Res-Care has not argued that the integration mandate requires the closure of all institutions or that continued operation of institutions would be 'illegal'."

Petition, page 5.

The State of Kentucky agreed that *Olmstead* established no "public policy" requiring ICFMRs to be closed and decertified. In its Amicus Brief in the trial court, the State of Kentucky expressly rejected Res-Care's argument that the ADA or *Olmstead* required the closing and relocation of the 1,200 residents of Kentucky's state-run and state-licensed ICFMR programs:

> "There is no doubt that it would place an unreasonable financial burden on Kentucky, and indeed would fundamentally alter this state's Medicaid program, if it were compelled to provide community-based residential services to all of the approximately 1,200 people with mental retardation or developmental disabilities in state licensed long term care facilities."

Appendix, page 68(a).

After admitting that neither the ADA nor *Olmstead* established a "public policy" requiring the closure of ICFMRs, in general, it is difficult to understand Res-Care's argument to this Court for how it could be possible that the ADA and *Olmstead* excused Res-Care's closing and decertification of Omega's ICFMR, in breach of its Lease.

This is not the 17th Century. Res-Care is not a "privateer," with "letters of marque" to privately plunder the business operations of competitors, to do privately what the State could not do directly. The economic chaos that would be imposed by allowing such an ephemeral "public policy" argument to excuse some private contract violations, but not others, can scarcely be overstated. Once Res-Care admitted, as it did, that no public policy generally requires facilities such as Omega's to be closed and decertified, it cannot rationally argue that this non-existent public policy

nevertheless justifies the impairment of Omega's contract rights, in order to excuse what otherwise is Res-Care's actionable breach of contract.

B. This case only affects the litigants in a simple breach of contract case.

For Res-Care's breach to be excused on the basis of "public policy," a public policy must be found that is applicable to more than one private Kentucky ICFMR. If it has no broader application, there is no need for a Supreme Court pronouncement about it. By denying that any public policy exists applicable to any other ICFMRs and leases (Res-Care Petition, page 5),
Res-Care destroys any reason for this Court to grant certiorari.

C. Res-Care admits that the real reason it breached the Lease was to fund its own alternative business plan.

Res-Care states succinctly on page 6 of its Petition:

> "But the Health Care Financing Administration (now Centers for Medicare and Medicaid Services) required Res-Care to close its ICFMR operations before Medicaid would provide funding for Res-Care's clients in the community. So Res-Care closed its institutional operations at Excepticon, withdrew from the Medicaid program for the Excepticon ICFMR, and left Omega with what was previously leased to Res-Care - a building. However, because the building could not be used as an ICFMR, Omega could not lease it to a new operator."

Petition, Page 6.

Res-Care bartered a right which it did not have under its contract with Omega, for no better reason than to further the Res-Care business plan.

For all of Res-Care's effort to pose as a champion of public interest, its decisions and actions were motivated only by money. Res-Care's president acknowledged that Res-Care is a for-profit public corporation in which "every decision we make is based upon a cost benefit analysis." (Rec. Doc. 182, page 25 citing Geary Deposition, page 69, lines 9-10.) Both Indiana and Kentucky Omega facilities were closed and decertified by Res-Care because Mr. Geary saw an opportunity to divert money away from Omega's ICFMR facilities and into an expansion of Res-Care's "waiver" business. (Rec. Doc. 182, page 21, citing Geary Deposition, page 80, lines 5-13). Res-Care held internal discussions about increasing its Medicaid waiver service business by leasing Medicaid-certified ICFMR facilities, and decertifying those facilities, in exchange for additional waiver slots that would be serviced by Res-Care. (Rec. Doc. 180, page 13, citing Cross Deposition, page 90, lines 18-24; page 91, lines 1-24; page 92, lines 1-22.)

Res-Care knew that it would need increased Medicaid funding to make its expansion of its waiver business practical (Rec. Doc. 180, page 13, citing Cross Deposition, page 82, lines 14-24; page 83, lines 1-23.) These waiver slots would be funded by the savings generated to the states from the decertification of the ICFMRs that Res-Care was leasing from Omega. (Rec. Doc. 180, page 13 citing Cross Deposition, page 91, lines 1-24, page 92, lines 1-22.) Res-Care knew that the leased Omega facilities would need to be closed permanently, in order to accomplish Res-Care's goal. (Rec.

Doc. 180, page 13, citing Geary Deposition, page 33, lines 10-19.) Ron Geary, Res-Care's President, Chairman, and CEO, described this process as moving "a pot of money" from Omega's ICFMR facilities to waiver slots that would be serviced by Res-Care (Rec. Doc. 180, page 14, citing Geary Deposition, page 79, line 1; page 80, lines 1-13.)

Res-Care admits that closing Omega's facility was incompatible with the continued operation of the facility as an ICFMR after the expiration of Res-Care's Lease term. (R. 185, page 12; R. 186; Waskey Deposition, page 72.) The financial windfall to Res-Care was enormous, because the only "price" that it was paying for a multi-million dollar increase in the funding available for Res-Care's community service business was the decertification of a facility it did not own and had no right to decertify.

D. The legal standard for establishing a "public policy" defense was not met.

The test in Kentucky for determining when a contract may be declared unenforceable as against public policy is the determination that the contract "has a direct tendency to, and would if upheld and enforced, injuriously affect a material and substantial part of the public." *Forbes v. City of Ashland*, 246 Ky. 669, 55 S.W.2d 917, 919 (1932). Kentucky courts do not favor altering agreements on public policy grounds, and the Supreme Court of Kentucky has admonished that "the courts should use extreme caution in declaring a transaction to be void on the ground that it is against public policy." *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 221 S.W.2d 435, 439 (1949). In Kentucky, public policy violations are an issue of law for the court. *Firestone Textile Company Division v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983).

In determining whether a contract violates public policy, the United States Supreme Court has emphasized that a court must give due deference to the party's freedom of contract.

> "It is a matter of great public concern that freedom of contract not be lightly interfered with."

Steele v. Drummond, 275 U.S. 199, 48 S.Ct. 53, 54 (1927).

The illegality principle "must be cautiously applied to guard against confusion and injustice." *Id.* at 54. "It is only in clear cases that contracts will be held void." *Id.*

> "The principal that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests."

Twin City Pipeline Company v. Harding Glass Company, 283 U.S. 353, 51 S.Ct. 476, 477 (1930).

Courts must be careful not to permit a party to avoid its liability under contract by hiding behind an unwarranted public policy defense.

> "The usual and most important function of courts . . . is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy."

Baltimore & Ohio Southwest Railway Company v. Voight, 176 U.S. 498, 20 S.Ct. 385, 387 (1899).

Res-Care's "public policy" defense fails to meet these legal standards.

E. *Olmstead* expressly rejected Res-Care's position a few months before the breach.

The *Olmstead* decision in June of 1999 did not support Res-Care; it repudiated Res-Care's position. The Court clearly faced the question of whether ICFMRs were to be forced to close, as a matter of public policy, in order to accomplish the integration of residents into smaller community-based homes. The U.S. Supreme Court expressly declared that no such public policy existed and the ADA could not be read to require such closing. *Olmstead v. LC*, 527 U.S. 581, 144 L.Ed2d 540, 119 S.Ct. 2176 (1999).

In *Olmstead*, the Supreme Court found that two women, one diagnosed with schizophrenia and the other with a personality disorder, who were confined for treatment in the psychiatric unit of Georgia Regional Hospital in Atlanta, were being discriminated against. The women's treating professionals had concluded that each of the women could be cared for appropriately in a community-based program, but the State of Georgia had refused to permit such placement for them. The holding of the Supreme Court, written by Justice Ginsburg, is as follows:

> "Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than institutions. The answer, we hold, is a qualified yes. Such action is in order when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account

> the resources available to the state and the needs of others with mental disabilities."

Page 587.

The Court specifically stated that its decision was not Constitutionally based, but was exclusively based upon its interpretation of the provisions of the ADA. *Id.* at 588. The Supreme Court in *Olmstead* specifically rejected the argument that ICFMR facilities would need to be closed in order to comply with the ADA, or the *Olmstead* decision:

> "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."

Pages 601-602.

> "Nor is there any federal requirement that community-based treatment be imposed on patients who did not desire it."

Page 602, paragraph 13

> "As already observed, see supra, at 17, the ADA is not reasonably read to compel states to phase out institutions, . . ."

Page 604.

> "For other individuals, no placement outside the institution may ever be appropriate." See Brief for American Psychiatric Association, *et al. as amici* curiae, 22-23 ("some individuals, whether mentally

> retarded or mentally ill, are not prepared at particular times - perhaps in the short run, perhaps in the long run - for the risks and exposure of the less protective environment of community settings;" for these persons, "institutional settings are needed and must remain available."); Brief for Voice of the Retarded, *et al., as amici curiae*, 11 ("each disabled person is entitled to treatment in the most integrated setting possible for that person - recognizing that, on a case-by-case basis, that setting may be in an institution."); . . .

Page 605.

Each of the opinions written in *Olmstead* concurred on one principle. They all agreed that neither their decision, nor the ADA, required the closing of existing facilities. Justice Kennedy, joined by Justice Breyer, wrote in their concurring opinion:

> "It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that states had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision."

Pages 609-610.

> "The State is entitled to a wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs."

Page 610.

The *Olmstead* decision suggests that, if there was any violation of public policy in this case, it was by Res-Care. *Olmstead* requires residents to be given a choice of accommodations. Res-Care gave no such choice to the residents of Omega's facility. Res-Care admitted it closed the facility and left all of the residents with no alternative but to relocate. *Olmstead* requires that a continuum of care options be provided by each state, and recognizes that there is a need for facilities like Omega's to serve those residents in need of more intensive care, treatment, and security. Res-Care's decertification of Omega's facility removed it as a continuum of care option.

F. The Commonwealth of Kentucky, and Res-Care itself, rejected Res-Care's public policy claim by their actions.

The Commonwealth of Kentucky rejected Res-Care's "public policy" premise, as did Res-Care itself. The Commonwealth of Kentucky rejects the premise by continuing to operate its own large ICFMRs in Kentucky, and by continuing to permit the operation of private ICFMRs in the State. Res-Care was, at the time that it closed Omega's facility, the country's largest provider of large ICFMR care. At the same time that Res-Care claims that a "public policy" required it to decertify Omega's facility, Res-Care was purchasing and operating nearby large ICFMRs for profit. Even though the ADA was enacted in 1990, Res-Care saw no "public policy" requirement to empty and decertify any of its leased ICFMRs, including Omega's, until after a decade of profitable operation, and multiple Lease extensions, when Res-Care's lease was about to expire.

Res-Care's chairman, president, and CEO, in a suit brought by Res-Care against the State of Indiana, in sworn testimony provided in an effort to increase the reimbursement rate paid by the State of Indiana to Res-Care for the operation of Indiana ICFMRs, testified that:

> "The individuals we serve are extremely dependent upon an extensive range of specialized services, which are not available in settings other than ICFMRs."

Rec. Doc. 182, page 5.

Res-Care's actions, like its CEO's testimony, reject the claim that "public policy" demands decertification of ICFMRs:

> "Res-Care admits that the continuing operation of such facilities is perfectly legal (Winters Depo., page 105, lines 20-24), and in fact, Res-Care is the nation's largest provider of ICFMR services. During the same time period in which Res-Care wrongfully closed the Omega-owned facilities, Res-Care purchased three Indiana ICFMRs which had continued to operate, and such facilities continue to be operated by the State of Kentucky and the State of Indiana today (Winters Depo., page 26, line 25; page 27, line 6)."

Rec. Doc. 182, page 3.

The State of Kentucky never threatened to close Omega's facility, before Res-Care's offer to voluntarily do so. (R. 185, page 10; R. 186; Cross-Depo., page 11.) The State of Kentucky has never attempted to force any legally operating private ICFMR to close for the purpose of seeking to "downsize" or to convert its ICFMR funding into "waiver

slots," nor did the State have any future plans to do so. (R. 185, page 10; R. 186, Boyd Depo., pages 19-20.)

The Kentucky Supreme Court has consistently held that public policy is to be determined by the legislature, and that courts overstep their bounds when they intrude upon that legislative prerogative. ". . .We adhere to the principle that the establishment of public policy is the prerogative of the general assembly." *Reda Pump Company, A Division of TRW, Inc. v. Finck*, 713 S.W.2d 818, 821 (Ky. 1996). "It is elementary that the legislative branch of government has the prerogative of declaring public policy and that the mere wisdom of its choice in that respect is not subject to the judgment of the court." *Fann v. McGuffey*, 534 S.W.2d 770, 779 (Ky. 1975).

There can be no valid "public policy" defense to Res-Care's breach, where the U.S. Supreme Court, the Kentucky Supreme Court, public officials of the State of Kentucky in charge of the programs, and Res-Care itself, including its CEO, have all expressly rejected, by word and by deed, the "public policy" behind which Res-Care is attempting to hide.

G. Res-Care's breach was about making money, not ADA compliance.

Contrary to Res-Care's hyperbole, Omega's facility was hardly a "buggy-whip factory." The facility was full, until Res-Care emptied and closed it in 1999. The "trend" toward community services was not a disaster for owners of such facilities, as Res-Care asserts. To the contrary, it presented a significant economic opportunity. When Res-Care was preparing to close and decertify Omega's Indiana facilities, a year before the decertification of the Kentucky facility, Res-Care prepared pro formas projecting an increase in its net

profits of up to $70,000 per month, for servicing the 116 residents which decertification would move from Indiana facilities to Res-Care waiver business. (Brief in Support of Plaintiff's Motion for Summary Judgment on Res-Care and CAI's Fourth Affirmative Defense, Rec. Doc. 113, page 8, Exhibit 9I.) The closing of Omega's Kentucky facility would add 180 new captive customers for Res-Care's waiver business, 50% more than the total in Indiana.

Why was it so important to Res-Care to be the operator at the time that Omega's Kentucky facility was decertified, that it refused to leave at the termination of the Lease? Res-Care went to the extreme of obtaining injunctive relief from the District Court permitting it to retain control past the end of the Lease term. That is certainly odd behavior for someone who alleges that it was operating a "buggy-whip factory," when it could have quietly turned over the facility to the successor operator, and left at the end of the Lease.

Res-Care knew that the single most important factor in residents determining where they would want to go to receive community-based services, after leaving the familiar surroundings of the ICFMR, would be where they could still have the same familiar personnel who had been providing them services before they left the facility. Res-Care knew that if another operator took over the facility, and purchased from Omega the right to decertify that facility at the conclusion of its Lease, that successor operator would be likely to retain most or all of the 180 Omega facility residents as community service clients, once decertification occurred.

The ability to gain an overwhelming advantage in obtaining 180 clients for a multi-million dollar community-based waiver service business was extraordinarily valuable. The successor operator to Res-Care would have paid a

considerable premium to obtain that advantage. Res-Care could also have obtained that advantage, by negotiating for the elimination from the Lease of the restrictions against decertification. Res-Care had no interest in purchasing the right to own, close, and decertify Omega's facility. (R. 185, page 12; R. 186, Geary Deposition, pages 110-111.) Res-Care did not want to pay for rights that it thought it could simply take.

This dispute was never about "public policy." It is about whether it would be Res-Care, or one of its competitors, who would acquire the valuable contract right to decertify Omega's ICFMR, and transfer the funding for 180 residents into a community-based waiver service business that it would dominate. Omega would have sold that right to either, but objects to it being taken without its permission, without compensation, and in violation of its contractual rights. This dispute is about whether Res-Care can avoid paying Omega for the acquisition from Omega of a multi-million dollar business advantage. Nothing more. The Seventh Circuit saw this case for what it is and decided it correctly.

In order to reject Res-Care's "public policy" defense, the Court need only take judicial notice of the fact that the federal government continues to provide Medicaid funding for ICFMR facilities throughout the country, the Commonwealth of Kentucky continues to operate such facilities, and Res-Care itself continues to own and run them.

In order to deny the Petition for Writ of Certiorari, the Court need only note that this case is only about whether one private company can take the assets of another private company, in breach of its contract and for its own financial gain, without having to pay for it.

IV. Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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